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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/645,758	08/21/2003	Begum Tamer	67551	8044

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EXAMINER	
CHAWLA, JYOTI	
ART UNIT	**PAPER NUMBER**
1761	

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	03/23/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary	Application No.	Applicant(s)	
	10/645,758	TAMER ET AL.	
	Examiner	Art Unit	
	Jyoti Chawla	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *10 January 2007*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *6, 8-23* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *6 and 8-23* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☒ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. The Amendment submitted January 11, 2007 has been entered. Claims 6, 8-23 are pending and examined in the current application.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

(A) Claims 6, 10-13, 16-17, 20-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Negro (US 4629628) in view of the combination of Technology of biscuits, crackers and cookies, and of Dictionary of Food Ingredients.

The references and rejection are incorporated herein and as cited in the office action mailed October 11, 2006.

Regarding applicant's arguments about claim 12, (Remarks, pages 8-9) it is noted that the applicant has chosen to use parameter that cannot be measured by the Office, for the purpose of prior art comparison as stated in the previous office actions. Negro does not teach the viscosity of the batter as stated in the previous office actions, however, Negro reference does teach a batter thickness (i.e., viscosity) such that the wafers produced by the batter compositions of Negro, have a thickness range of 2-5 mm per wafer (Column 6,Table) Negro further teaches wafers that have a thickness of 2.5 to 3 mm (Column 5, lines 47-53). Regarding the thickness of the wafer of the invention, it is noted that the applicant states that the thickness of wafer of the invention is 30 mm, however, the support for that has not been found in the specification. The specification discloses a wafer thickness of 3.0mm (Specification: Page 3, line 34 or Publication: Page 1, paragraph 0017) and the stack of 6 wafers with 5 layers of cream fillings and chocolate coating with a total height (i.e., thickness) of 21 mm (Specification: Page 6,

lines 1-10 or Publication: Page 2, paragraph 0028). Thus, Negro teaches of the thickness of 2-5mm especially 2.5-3mm, which includes the 3mm thickness of the wafer of the invention as discussed above. It is noted that if the thickness of the wafers produced by two batters is same, their batter viscosity will be similar too. Therefore, based on the above discussion one of ordinary skill in the art at the time of the invention would expect that the wafer batter taught by Negro to have the batter viscosity in the range recited in claim 12, as the resulting wafers taught by Negro have the thickness of 2.5-3mm, which is about the same as 3.0 mm as disclosed by the applicant in the specification.

(B) Claims 8-9, 14-15 and 18-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Negro (US 4629628) in view of the combination of Technology of biscuits, crackers and cookies, and of Dictionary of Food Ingredients Industry as applied to claims 6, 10-13, 16-17, 20-23 above, further in view of Eiji Ito et al (JP05-316930). The references and rejection are incorporated herein and as cited in the office action mailed October 11, 2006.

(C) Claims 6, 8-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Negro (US 4629628) in view of the combination of Daggy (US 5955123), Technology of biscuits, crackers and cookies, and of Dictionary of Food Ingredients.

Negro teaches of wafers that can be filled and stacked (Column 2, lines 9-18). Negro also teaches wafer with good stability strength, smooth dense surface and can be used as filled wafer with two or more wafer sheets (column 2, lines 18-22) and has organoleptic properties along with delicacy and crispiness (column 1, lines 10-21). The wafers taught by Negro are 2.5 to 3 mm thin (Column 5, line 49) and can be made by including cocoa powder in the batter preferably about 1.5% by weight (Example, Column 4).
Negro reference teaches wafers with all the ingredients recited by the applicant in claims 6, 13 and 17. Negro teaches known batter recipes for wafers (Column 2, line 55

to column 3, line 14 and column 4, lines 55-68). The relative proportions of ingredients in wafer batter as taught by Negro are:

- Flour (total starch and flours) 30% (Recipe III, {(10Kg/33Kg) 100}) to 38.5% (Preferred wafer Example Column 4) to 40% ({(25Kg/62 Kg) 100}Recipes I and II), i.e., 30%-40% flour, which falls in the range recited by the applicant.
- Vegetable oil 0% (Recipe II), 0.3% ({(200g/62Kg) 100} Recipe I) to 0.15% (Recipe III {(50g/33Kg) 100}) and 2.5% (Example column 4 {(25g/1000g) 100}), i.e., Negro teaches a range of 0% to 2.5% oil, which falls in the range recited by the applicant.
- Sodium bicarbonate or soda bicarb or soda is a well-known rising agent. Sodium bicarbonate 0.04% ({(0.4 g/1000g) 100} Example column 4), about 0.24% ({(150g/62 Kg)100} Recipe I) to 0.056% (Recipe II {(35g /62Kg) 100}) and 0.22% ({(75g/33Kg) 100} Recipe III), i.e., Negro teaches a range of 0.04% to about 0.2% of sodium bicarbonate, which falls in the range recited by the applicant. Also see Column 2, lines 27-31 and Column 3, lines 22-27.
- Water 58% ({(36Kg/62 Kg) 100} Recipes I and II) to 54%-60% ({(18-20/33)100} Recipe III) and 56% ({(560g/1000g) 100} Example in column 4), i.e., Negro teaches a range of 54%-60% of water, which encompasses the range recited by the applicant.
- Salt or cooking salt 0.08% ({(0.050Kg/62Kg) 100} Recipes I and II) to 0.1% (Example Column 4) and 0.106% ({(0.035Kg/33Kg) 100} Recipe III), i.e., 0.08%-0.11% Salt, which falls below the range recited by the applicant.
- Lecithin 0% (Recipe II), about 0.16% ({(100g/62Kg)100} Recipe I) to 0.15% (Recipe III {(50g /33Kg) 100}) and 0.15% (Example column 4 {(24g/1000g) 100}), i.e., Negro teaches a range of 0% to about 0.16% lecithin, which falls below the range recited by the applicant.
- Cocoa powder 1.5% ({(15 g/1000g) 100} Example column 4). Negro teaches 1.5% of cocoa powder, which falls below the recited range of the applicant.

Thus, Negro teaches of wafer compositions that contain flour, water, oil, sodium bicarbonate, salt, cocoa powder and lecithin as recited by the applicant. Regarding the relative proportions of the ingredients, Negro teaches flour, water, vegetable oil and sodium bicarbonate in the range recited by the applicant in claims 6, 12, 13, 16 and 17. Negro further teaches a few examples of the wafer compositions (recipes) and in the examples the wafer composition comprises flour, water, vegetable oil, sodium bicarbonate, and lecithin. Some examples contain no oil and no lecithin and others do not contain cocoa powder, indicating that it is possible to make wafers with or without oil and cocoa powder and lecithin.

Regarding the specific amount of cocoa powder as recited in claims 6, 8, 9, 12, 13, 16-19, Negro teaches 1.5% cocoa powder in the wafer, which is less than the recited range of the applicant (i.e., 2-10% in claims 6, 12, 13, 16 and 17; 2-8% cocoa powder as recited in claims 8, 14, and 18; 3-6% cocoa powder as recited in claims 9, 15, and 19). Cocoa powder is a flavoring agent which is a dry powder obtained from cocoa beans after processing. The amount of flavoring agent used in a batter composition can be variable based on the flavoring desired in the final product. Since Negro does not teach the recited amount of cocoa powder, one of ordinary skill in the art would have been motivated to look to the art of baked batter and dough based biscuit or cookie products for amount of cocoa powder used in the art. Daggy teaches baked compositions as discussed above (Column 3, line 55 to Column 5, line 56). Regarding the choice and amount of flavoring agent, Daggy teaches that one or more flavoring agents may be added to the composition and cocoa powder is one of the listed flavoring agents. Daggy further teaches that the amount of an flavoring agent in that baked goods can vary from 0.0-30% (Column 5, lines 34-45), which includes range recited by the applicant in claims 6, 8, 9, 12, 13, 16-19. Thus, baked products, such as cookies and biscuits with levels of cocoa powder in the recited range of the applicant were known in the art at the time of the invention and it would have been obvious for one of ordinary skill in the art at the time of the invention to modify Negro and add more cocoa powder to the wafer

batter to enhance the cocoa flavor in the wafer. One would have been further motivated to add more cocoa powder to enhance the color to obtain a darker brown wafer.

Regarding the specific amount of lecithin, Negro does not teach the amount of lecithin as instantly claimed. Lecithin is an emulsifier and also used as a wetting agent and the amount of lecithin needed in a batter would be variable based on the type and amount of the oils to be emulsified and other emulsifiers present in the composition. Since Negro does not teach the recited amount of lecithin, one of ordinary skill in the art would have been motivated to look to the art of baked batter and dough based biscuit or cookie products for other amounts of lecithin used in the art. Daggy teaches baked compositions, cookies and biscuits etc., with fiber (Abstract and Column 3, lines 49-55). Daggy teaches that the baked products contain shortening, i.e., vegetable oils (0.5-30%), flour (10-70%), Water (5-60%), Sweetening agents (1-40%), sodium bicarbonate (0-2%), emulsifiers and flavoring agents (Column 3, line 55 to Column 5, line 56). Regarding the emulsifier, Daggy teaches that one or more emulsifiers may be added to the composition and lecithin is one of the emulsifiers listed. Daggy further teaches that the amount of an emulsifier in that baked goods can vary from 0.1-30% (Column 5, lines 5-25 and 50-56), which includes applicant's recited range.
Furthermore, Technology of biscuits, crackers and cookies teaches wafer batter (Table 29.1, Page 294) recipes that contain lecithin in an amount of 0.3% ({(0.95g/250g) 100} Recipe 4). Table 29.1 summarizes typical wafer recipes that are basic and general guidelines that can help in creation of a suitable batter based on personal preference (Also see pages 294-296). Thus, wafer batters with lecithin levels in the recited range of the applicant were known in the art at the time of the invention. Therefore, it would have been obvious for one of ordinary skill in the art at the time of the invention to modify Negro and add more lecithin to condition the batter/dough and control the consistency in order to make the wafer batter more stable and help wet the dry ingredients, including cocoa powder.

Negro teaches a range of salt in the wafer recipe between 0.1 to 0.11%, which is lower than the recited range of the applicant. However, salt in a wafer batter is primarily added to enhance the flavor (Technology of biscuits, crackers and cookies, page 295), therefore adding salt in slightly different amounts in order obtain the desired flavor, would be considered as art recognized variable and applicant's intended function would have been obvious. Since Negro does not teach the recited amount of salt, one of ordinary skill in the art would have been motivated to look to the art of baked batter and dough based biscuit or cookie products for amount of salt used in the art. Daggy teaches baked compositions as discussed above (Column 3, line 55 to Column 5, line 56). Regarding the amount of salt, Daggy teaches addition of 5ml of sodium chloride, i.e., salt to a composition where the sum of all ingredients is 821.5 ml (Column 6, Example 1), which can be interpreted as ({(5/821.5) 100}=0.6%, which falls in the range recited by the applicant in claims 6, 13 and 17. Thus, baked products, such as cookies and biscuits with levels of salt in the recited range of the applicant were known in the art at the time of the invention and it would have been obvious for one of ordinary skill in the art at the time of the invention to modify Negro and add more salt to the wafer batter to further enhance the flavor of the wafer as salt is a well known flavor enhancer. Further, attention is invited to In re Levin, 84 USPQ 232 and the cases cited therein, which are considered in point in fact situation of the instant case. At page 234, the Court stated as follows:This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a co action or cooperative relationship between the selected ingredients, which produces a new, unexpected and useful function. In re Benjamin D. White, 17 C.C.P.A. (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221.

Regarding claims 10, 11 and 20, Negro teaches of coated and cream filled sandwiches. Regarding enrobing the wafers with chocolate as recited in claims 11 and 20, enrobing is defined as providing with a coating and Negro teaches of wafers that can be coated with chocolate or other coating compositions (column 1, lines 45 to Column 2, line 25). Negro further teaches that the wafers are known to have chocolate or other coating, which can be thick or thin based on the texture of the wafer (Column 1, line 49 to column 2, line 25). Negro teaches wafers are used to make filled wafers consisting of two or more wafer sheets (Column 2, lines 18-22). Negro does not specifically teach filling with cream, however, Technology of biscuits, crackers and cookies teaches that wafers sold in the market are usually formed as rigid large flat sheets that are subsequently sandwiched with cream before cutting with saws or wires and the wafers may be chocolate enrobed (Page 290). Thus filled wafers with two or more sheets were known at the time of the invention (Negro). Filling of wafers with cream was known at the time of the invention (Technology of biscuits, crackers and cookies). Enrobing or coating of wafers with chocolate or other coating was known at the time of the invention (Negro and Technology of biscuits, crackers and cookies). Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify Negro and fill the two or more layered wafers as taught by Negro with a cream filling before coating or enrobing the filled wafers as instantly claimed.

Claim 16 recites the method of making of a stacked filled wafer with 2-10% cocoa powder. Negro teaches of a filled wafer with 1.5% cocoa powder two or more wafer sheets (stacked). Regarding the modification in the amount of cocoa powder refer to the rejection above regarding claims 6, 8, 9, 12, 13, 16-19, where Daggy teaches that cocoa is one of the known flavoring agents that can be added to biscuits and cookies in the range of 0-30% (Daggy, Column 5, lines 34-45), which includes range recited by the applicant in claim16. Thus making filled and stacked wafers containing cocoa powder were known at the time of the invention. Therefore it would have been obvious for one of ordinary skill in the art at the time of the invention to modify the amount of cocoa

powder in the wafer composition taught by Negro and add more cocoa powder to enhance the coco or chocolate flavor.

Regarding claims 21-23, Negro teaches a single wafer size of 90 mm X 25 mm X 2-5mm, where the length of the wafer is 90mm, which falls in the recited range of about 90mm to about 92mm. The width of filled wafer stack as taught by Negro is 25 mm, which is about 30mm as recited in claim 21. Negro reference also teaches filling and stacking of wafers in two or more sheets (Column 2, lines 18-22) as discussed above, thus if the wafer sheets are 2-5 mm (Column 6, Table) and specifically 2.5-3 mm thick (Column 5, lines 45-55) and form a filled and enrobed or coated sandwich, then 3-7 wafer stack with filling and chocolate coating would have the height of about 21mm as recited by the applicant in claim 21. Regarding claim 23, Negro teaches of stacked filled wafers consisting of two or more wafer sheets (Column 2, lines 18-22), which would encompass the 6 or 7 wafer layers and corresponding 5-6 filling layers as recited in claim 23. Further technology of biscuits, crackers and cookies teaches that wafers sold in the market are usually formed as rigid large flat sheets that are subsequently sandwiched with cream before cutting with saws or wires and the wafers may be chocolate enrobed (Page 290). The reference further teaches that coated wafer sheets are built up into piles as desired and a plain topping wafer sheet is added to complete the stack (page 302). Thus, stacked filled and enrobed or coated wafers with two or more sheets of wafers as taught by Negro and Technology of biscuits, crackers and cookies were known in the art at the time of the invention. Therefore, one of ordinary skill would expect the wafer taught by Negro to make a 6-7 layered cream-filled wafer sandwich that is enrobed or coated with chocolate. Furthermore, cutting of wafer sheets in a different size or shape or stacking wafer sheets in stacks of 3 layers or 5 or 7 layers would not have involved an inventive step, and does not provide patentable distinction to the claims. Thus, the claimed invention would have been obvious over modified Negro, absent any clear and convincing evidence and/or arguments to the contrary. Also see MPEP 2144.04 IV A, which outlines that where the only difference between the

prior art and the claims is a recitation of relative dimensions of the claimed subject matter and a product having the claimed relative dimensions would not perform differently than the prior art product, the claimed product is not patentably distinct from the prior art product.

Regarding claim 12, Negro does not specifically state the viscosity of the batter, however, Negro reference does teach a batter thickness (i.e., viscosity) such that the wafers produced by the batter compositions of Negro, have a thickness range of 2-5 mm per wafer (Column 6,Table). Negro further teaches of wafers that have a thickness of 2.5 to 3 mm (Column 5, lines 47-53). Regarding the thickness of the wafer of the invention, it is noted that the specification discloses a wafer thickness of 3.0 mm (Specification: Page 3, line 34 or Publication: Page 1, paragraph 0017) and the stack of 6 wafers with 5 layers of cream fillings and chocolate coating with a total height (i.e., thickness) of 21 mm (Specification: Page 6, lines 1-10 or Publication: Page 2, paragraph 0028). Thus, Negro teaches of the thickness of 2-5 mm, specifically 2.5-3mm, which includes the 3 mm thickness of the wafer of the invention as discussed above. It is noted that if the thickness of the wafers produced by two batters is same, their batter viscosity will be similar too. Therefore, based on the above discussion one of ordinary skill in the art at the time of the invention would expect the wafer batter taught by Negro to have the batter viscosity in the range recited in claim 12, as the resulting wafer taught by Negro has the thickness of 2.5-3 mm, which is about the same as 3.0 mm as disclosed by the applicant in the specification.

Further, the applicant is reminded that where the claimed and prior art products are identical or substantially identical in structure or composition, or are produced by identical or substantially identical processes, a prima facie case of obviousness has been established. In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977). "When the PTO shows a sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not." In re Spada, 911F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990). Furthermore,

applicant has chosen to use parameter that cannot be measured by the Office, for the purpose of prior art comparison, because the office is not equipped to manufacture prior art products and compare them for patentability. Therefore, as a prima facia case of obviousness has been properly established, the burden is shifted to the applicant to show that the prior art product is different.

Since Negro modified in view of the combination of Daggy and Technology of biscuits, crackers and cookies makes a wafer product containing cocoa powder that may be filled, stacked and enrobed in chocolate and produced in desired thickness range and trimmed to final dimensions in the approximate size claimed, therefore it would have been obvious to one of ordinary skill in the art at the time of the invention that above combination of references teaches the invention recited in claims 6, 8-23.

Response to Arguments

Applicant's arguments filed January 11, 2007 have been fully considered but they are not persuasive.

I) Applicant's arguments regarding Negro not teaching a wafer batter recipe with 2-10% cocoa powder and 0.2 to 0.3% lecithin have been considered and responded to in the office action above. Regarding the argument that Negro does not teach cocoa powder and lecithin in the recited amounts as stated in the rejection mailed October 11, 2006, it is noted that the amount of cocoa powder and lecithin were rounded off to the nearest number for ease of calculation 2% for cocoa powder and 0.2% for lecithin. It is further noted that slight changes in the amounts of commonly used ingredients in a recipe does not constitute a patentable distinction (In re Levin, see above) absent any clear and convincing evidence and/or arguments to the contrary.

II) Regarding the viscosity of the batter as recited in claim 12, it is noted that the applicant has chosen to use parameter that cannot be measured by the Office, for the purpose of prior art comparison, because the office is not equipped to manufacture prior

art products and compare them for patentability. Therefore, as a prima facia case of obviousness has been properly established as discussed above and in previous office actions and the burden is shifted to the applicant to show that the prior art product is different.

Applicant's argument that viscosity of wafer taught by Negro is not similar to the viscosity of wafer batter of the invention. In the argument the applicant states and states "Examiner states that even though Negro does not specifically state the viscosity of the batter, it teaches a similar composition and thickness wafer and therefore it has the viscosity recited by Applicants in independent claim 12. As acknowledged by the Examiner, a specific viscosity value or range is nowhere stated in Negro. Furthermore, Negro does not teach a wafer with similar composition (as discussed above) and thickness as Applicants' (Negro has a thickness range of 2-5 mm per wafer layer, whereas Applicants disclose a thickness of 30 mm per wafer) and as a result it cannot be assumed that Negro discloses the same viscosity batter if it does not contain the same quantities and ingredients as Applicants' wafer batter. Even if the composition of Negro's wafer is taken to be similar to Applicants' wafer, to have the same viscosity range the composition would have to be the same, and not just similar. Assuming that the wafer of Negro did have the same viscosity, its composition of the wafer is still not the same as Applicants' wafer. Specifically, Negro does not contain 2-10% cocoa powder as disclosed in claim 12. Therefore, Applicants have shown that the prior art product of Negro is different, and thus does not make claim 12 obvious." (Remarks, Pages 8 and 9). Applicant's argument regarding the viscosity has been considered and responded to in the office action above.

III) Applicant's argument (Remarks, Page 9) that Negro does not teach the filling and enrobing of the wafer sandwich applicant is referred to Negro reference Column 1, line 45 to Column 2, line 26, where the reference teaches that filled and coated wafers were known. The reference further teaches of wafers that can be made as filled wafers with two or more wafer sheets. Thus applicant's argument is not persuasive as the reference teaches of filled layered wafer.

IV) Applicant's argument that " the Negro wafer has a size of 90mm x 25mm, which is the same length as Applicants' wafer. However, Applicants' wafer has a size of 90-92mm x 21mm, which is not the same as the Negro wafer". Applicant is reminded that the wafer size claimed is about 90 to about 92 mm long, about 30 mm wide and about 21 mm high. Thus 90mm as taught by Negro falls within the recited range for length and 25 mm width as taught by Negro is about 30mm. Regarding the height of the wafer stack, Negro teaches of 2-5mm thick wafers stacked with filling in two or more layers (Column 2, lines 18-22) as discussed above, thus if the wafer sheets are 2-5 mm (Column 6, Table) and specifically 2.5-3 mm thick (Column 5, lines 45-55) and form a filled and enrobed or coated sandwich, then 3-7 wafer stack with filling and chocolate coating would have the height of about 21mm as recited by the applicant in claim 21. Thus the reference teaches the invention as instantly claimed.

V) Regarding applicants arguments for rejection of claims 8-9, 14-15 and 18-19 (Remarks, pages 10-11), the applicant is referred to the rejection above and in previous office action, where it has been clarified that modifying the amount of cocoa powder from 1.5% as taught by Negro to 2% or 3% or more does not constitute a patentable difference. Cocoa powder is a flavoring compound and its amount can be varied.

a) In response to applicant's argument that Ito is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, Ito teaches of wafer cones where the amount of cocoa is 6%, which falls within the recited range of the applicant for claims 8-9, 14-15 and 18-19. The cones taught by Ito, are wafer cones thus the prior art used is analogous art.

b) Regarding the wafer cone taught by Ito, not having the similar composition as that of the invention, applicant is referred to the rejection in the previous office action dated October 10, 2006 where Ito has been relied upon to show obviousness of addition of cocoa powder in a wafer composition along a combination of references. In response

to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.,* 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Therefore, applicant's arguments have been considered fully and have not been found persuasive.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jyoti Chawla whose telephone number is (571) 272-8212. The examiner can normally be reached on 8:00 am to 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Jyoti Chawla
Examiner
Art Unit 1761

KEITH HENDRICKS
PRIMARY EXAMINER